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Supreme Court, U.S.
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No. ____

IN THE
Supreme Court of the United States

October Term, 1994

COMPUTER CURRICULUM CORPORATION,

Petitioner,

v.

INSTRUCTIONAL SYSTEMS, INC.
and
DEBORAH T. PORITZ, ATTORNEY GENERAL
OF THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the dormant Commerce Clause, a state franchise termination statute may be applied extraterritorially to prohibit commercial transactions occurring wholly outside the State's borders and to prevent out-of-state suppliers, potentially in perpetuity, from changing the way they distribute their products to consumers in other States.

2. Whether a federal court of appeals may avoid invalidating such a state statute by attributing the source of the extraterritoriality to the parties' contract rather than to the statute itself, despite a contrary reading of state law by the State's highest court; despite the fact that, absent the statute, the contract would have expired five years ago; and despite well-accepted principles of unconstitutional conditions and state action.

3. Whether, in performing the Commerce Clause balancing test for facially neutral state laws prescribed by *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), a court may refuse to consider as part of the burden on interstate commerce "the effect of the state regulation on the commerce of other states."

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to the proceeding below were the petitioner, Computer Curriculum Corporation, the defendant in the action; respondent Instructional Systems, Inc., the plaintiff in the action; and respondent Deborah T. Poritz, the Attorney General of the State of New Jersey, who intervened in the action to defend the constitutionality of the New Jersey statute in question.

Petitioner is an indirect wholly-owned subsidiary of Viacom, Inc. Petitioner has no subsidiaries to list pursuant to Rule 29.1.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 35 F.3d 813, and is reprinted as Appendix A in the separately bound Appendix accompanying this Petition. (1a-30a) The June 2, 1993 decision and order of the United States District Court for the District of New Jersey, 826 F. Supp. 831, granting summary judgment to petitioner on respondent's New Jersey Franchise Practices Act claim, is reprinted as Appendix B. (31a-83a) The opinion of the Supreme Court of New Jersey construing the statute in question during abstention proceedings, 614 A.2d 124, is reprinted as Appendix C. (84a-144a) The November 9, 1993 unpublished decision of the United States District Court for the District of New Jersey granting summary judgment to petitioner on respondent's common-law claims is reprinted as Appendix D. (145a-256a)

JURISDICTION

The decision of the court of appeals issued on September 16, 1994. Petitioner Computer Curriculum Corporation filed a timely petition for rehearing and rehearing in banc; respondent Instructional Systems, Inc. also filed a timely petition for rehearing. Both petitions were denied on November 3, 1994. *See* Appendix E (257a-260a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause provides that "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States." U.S. Const., Art. I, § 8, cl. 3.

The New Jersey Franchise Practices Act, N.J. Stat. § 56:10-1, *et seq.* (1993), is reprinted insofar as its provisions are relevant here as Appendix F. (261a-266a) Section 56:10-5 of the statute provides, in pertinent part:

> It shall be a violation of this act for a franchisor to terminate, cancel or fail to renew a franchise without good cause. For the purposes of this act, good cause for terminating, canceling, or failing to renew a franchise shall be limited to failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise.

STATEMENT OF THE CASE

This case involves the constitutionality, under the dormant Commerce Clause, of the New Jersey Franchise Practices Act, N.J. Stat. § 56:10-1, *et seq.* ("NJFPA"), insofar as it may be applied extraterritorially to regulate interstate distribution activities beyond New Jersey's borders.

New Jersey is one of a small minority of States that have adopted statutes regulating the termination and renewal of franchise or distribution relationships. Under the NJFPA, a franchisee with a "place of business within the State of New Jersey" can compel renewal of a franchise agreement after the agreement has expired unless "good cause" can be shown. N.J. Stat. § 56:10-4, -5. Because "good cause" is restricted to a showing of material breach of a franchisee's obligations and does not include bona fide business reasons, *see Westfield Centre Serv., Inc.* v. *Cities Serv. Oil Co.*, 432 A.2d 48, 55-57 (N.J. 1981), the effect of the NJFPA is to create franchises that may be "infinite" in duration. *Dunkin' Donuts of Am., Inc.* v. *Middletown Donut Corp.*, 495 A.2d 66, 76 (N.J. 1985).

In this case, a New Jersey-based distributor seeks to use the NJFPA to create such an "infinite" franchise in eight States *outside* New Jersey by compelling petitioner to renew an exclusive distribution agreement after it expired by its terms. The United States Court of Appeals for the Third Circuit held that the dormant Commerce Clause does not prevent such extraterritorial application of the NJFPA, even though it concededly would have the practical effect of controlling commerce wholly outside New Jersey's

borders: It would prohibit petitioner, a California software company, from selling its products directly to consumers or otherwise changing its method of distribution in other States. The court of appeals circumvented the Commerce Clause's *per se* prohibition on extraterritorial regulation of commerce by invoking the legal fiction that petitioner "agreed" to regulation of its out-of-state activities by entering into a multistate contract with the New Jersey distributor. The court also refused to consider "the effect of the state regulation on the commerce of other states" as part of the balancing test of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970).

Review by this Court is urgently needed to prevent the erosion of basic Commerce Clause principles. And the instant case is an excellent vehicle to do so. The constitutional questions are posed in a stark and procedurally unclouded form. There are no questions regarding the proper interpretation of the New Jersey statute, for during abstention proceedings below the New Jersey Supreme Court provided an authoritative construction of the law.

Moreover, the case at bar involves a matter of enormous practical importance for businesses nationwide: the extraterritorial application of franchise termination laws, which limit or, as in this case, remove entirely the power of suppliers engaged in interstate commerce to change distributors or distribution methods in response to dynamic competitive conditions. Because franchise termination laws deprive consumers of the benefits of efficient distribution, most States, as well as Congress, have refused to adopt them. But so long as *any* States are permitted to apply such laws extraterritorially, there will be a substantial distorting effect on interstate commerce; indeed, the fact that many multistate distributors have chosen to locate in New Jersey because of its prime "hub" location means that, under the decision below, New Jersey will be able to regulate a large portion of interstate distribution activities throughout the entire Northeast, or even the nation as a whole, in order to promote its own local economic interests.

Beyond its economic impact, the instant case raises especially important issues of federalism and state sovereignty, for States

applying franchise termination laws extraterritorially are in effect imposing their own controversial policy choices on their sister States and usurping Congress' power to regulate the national economy.

The relevant facts are not in dispute. Petitioner Computer Curriculum Corporation ("CCC") is a Delaware corporation with its principal place of business in California. CCC is an educational software company founded in the late 1960s by two professors at Stanford University. It pioneered the development of "integrated learning systems," a method of using computers to assist students to improve their skills in math, science, reading, and other subjects. In the mid-1970s, when both the industry and CCC were still in their formative stages, CCC appointed respondent Instructional Systems, Inc. ("ISI"), a New Jersey corporation, as its exclusive distributor in the Northeast. Although ISI's offices are in New Jersey, the great majority of its sales have occurred in other States.[1] J.A. 893.[2]

From its inception, the CCC-ISI relationship was governed by a succession of written contracts. Each contract has been for a definite term, consistent with the general practice of computer manufacturers to retain flexibility in their distribution arrangements in order to adjust to changing market conditions. Early in the relationship, CCC rejected a proposal by ISI for a perpetual distributorship because, as ISI's owner explained, "the market changes. The computer industry is very dynamic." J.A. 897.

In 1984, CCC and ISI signed a five-year contract (the "1984 Agreement") providing that ISI would be the exclusive distributor of certain CCC products to school districts and other customers in

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[1] Because of the parties' diverse citizenship, and the fact that the amount in controversy exceeded $50,000, the district court had jurisdiction of this case pursuant to 28 U.S.C. § 1332(a)(1); the court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, following certification by the district court under Fed. R. Civ. P. 54(b). (11a)

[2] Citations to the Joint Appendix in the court of appeals are styled "J.A. ___."

eleven States: Connecticut, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. The agreement expressly provided that it would "continue in effect until July 31, 1989," after which all rights granted to ISI would revert to CCC. J.A. 921, 929. It also explicitly provided that it would be governed by California law. J.A. 934.

During the five-year term of the 1984 Agreement, the educational software market changed dramatically, with many new entrants and intensifying competition. J.A. 876-81, 1056. At the same time, CCC grew concerned that ISI was not aggressively selling in eight of the States covered by the 1984 Agreement. In some of those States, ISI had not made *any* sales for years. J.A. 892-93, 901-02. Accordingly, CCC offered ISI a new contract, to take effect on expiration of the 1984 Agreement, limiting ISI's territory to New Jersey, New York, and Massachusetts (places in which ISI conducted almost all of its business). J.A. 909-11. CCC planned to distribute its products directly in the eight other States previously served by ISI.

ISI signed the new contract and simultaneously filed suit in New Jersey Superior Court, seeking an injunction to prohibit CCC from marketing its products in the eight States except through ISI. ISI argued that, under the NJFPA, CCC was compelled to renew the 1984 Agreement notwithstanding the contract's expiration date.[2]

The case was removed on diversity grounds to the U.S.

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[2] ISI also asserted claims under a number of common-law theories, including a claim that the parties had orally agreed that ISI's contract would be renewed unless CCC had good cause for nonrenewal. The district court granted summary judgment to CCC on all of ISI's common-law claims. The court ruled, for example, that the 1984 Agreement was "clear and unambiguous" that it would terminate on July 31, 1989 and that there was no evidence of any oral agreement to the contrary. (224a-234a) The Third Circuit affirmed the district court's dismissal of ISI's common-law claims. (29a) There remains pending in the district court a separate claim by ISI that the new three-state contract imposes "unreasonable standards of performance" in violation of N.J. Stat. § 56:10-7e.

District Court for the District of New Jersey. ISI persuaded the district court to abstain from deciding CCC's claim that application of the NJFPA to business outside New Jersey would violate the Commerce Clause, in order to allow a state court resolution of state-law questions concerning the scope and applicability of the NJFPA. The district court reserved the constitutional question, in accordance with *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).

Three years of proceedings ensued in the New Jersey courts. Eventually, the New Jersey Supreme Court held, by a 5-2 vote, that ISI possessed a "franchise" within the meaning of the NJFPA. The court also held that the NJFPA can be applied not only to regulate distribution activities within New Jersey, but also to regulate distribution activities outside New Jersey. The court specifically found that the New Jersey legislature intended to apply the NJFPA extraterritorially in order to protect New Jersey franchisees engaged in interstate commerce outside New Jersey's borders. The court explained: "we are remitted to the question of whether *the New Jersey Legislature* intended the Act to apply to franchise activities outside of the state. . . . [W]ould *the Legislature* have intended to protect a New Jersey businessperson that had invested substantial assets in a New Jersey-based hub of a multi-state franchise operation?" (129a; emphasis added) The court had previously answered this question in the affirmative, in holding that New Jersey's "strong policy in favor of protecting its franchisees," as embodied in the NJFPA, compelled it to override the parties' choice of California law, even with respect to activities outside New Jersey. (107a) "[T]he purpose behind franchise-act legislation is that dealers geographically situated in a forum state are to be the desired beneficiaries of the legislation in order to make their bargaining position more equal to manufacturers['']. To strip away the spokes of a 'hub-type' franchise would counter the purpose of such legislation." (106a; citation and internal quotation marks omitted) The court admitted that its reading of the NJFPA produced "some incidental extraterritorial effects" (132a), but opined that extraterritorial application of the statute nonetheless survived

Commerce Clause scrutiny. (129a-132a)[4]

When the case returned to federal court, the district court held that extraterritorial application of the NJFPA to compel renewal of ISI's exclusive distributorship in portions of its territory outside New Jersey would violate the Commerce Clause. In a thorough and well-reasoned opinion, the court explained that such application would "(1) regulate distribution of CCC's products within other states, (2) prevent CCC from changing its method of distribution in these states and (3) prohibit interstate transactions between CCC and school districts in these states." (60a) The court therefore granted summary judgment to CCC dismissing ISI's claim under the NJFPA to compel renewal in the eight States.

But the Court of Appeals for the Third Circuit reversed. The court of appeals never questioned that compelling renewal of the exclusive distribution agreement in the eight States would have the extraterritorial effects described by the district court. The court of appeals also acknowledged that, under *Healy* v. *Beer Institute*, 491 U.S. 324, 336-37 (1989), a state law with the "practical effect" of regulating commerce wholly outside the State is *per se* invalid under the Commerce Clause. Nevertheless, the Third Circuit refused to apply *Healy* to this case.

Instead, the court of appeals drew upon what it called "choice-of-law" principles and reasoned that "there is nothing untoward about applying one state's law to [an] entire [multistate] contract, even if it requires applying that state's law to activities outside the state." (25a) The court of appeals then treated the NJFPA as if it were an "ordinary state contract rule" that was "no more or less regulatory" than rules of contract interpretation. (25a) The Third Circuit reasoned that, because CCC agreed to enter into an exclusive multistate distribution contract with a New Jersey company, "it was the parties' own agreement which operated to

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[4] As the Third Circuit subsequently held, the views of the New Jersey Supreme Court on the Commerce Clause issue are of no preclusive effect, because CCC properly preserved its right under *England* to a federal court determination of this issue. (16a-18a)

project the New Jersey law outside of New Jersey's borders." (26a) The court of appeals acknowledged that CCC would find this surprising result "ironic," but nonetheless maintained that it followed from choice-of-law principles. (26a) The court concluded that *Healy* was distinguishable because here it was "the parties' contract," not "the state," which "dictated the extraterritorial effect." (26a)

The court of appeals also sustained the statute under the *Pike* balancing test by refusing to consider as part of the burden on interstate commerce "the effect of the state regulation on the commerce of other states." (28a) The court held that, because "the NJFPA is facially neutral," it "creates no incidental burdens on interstate commerce for purposes of *Pike* balancing." (29a)

The court of appeals decision would remand the case to the district court, forcing CCC to go to trial on ISI's claims under the NJFPA—notwithstanding CCC's objection that such a trial would itself impinge on the very Commerce Clause protections that CCC is seeking to enforce in this case. As the district court observed, the NJFPA is "compel[ling] CCC to undergo protracted litigation to exercise a right that New Jersey cannot constitutionally regulate—namely, the right of a non-New Jersey corporation to market and sell its products in states outside o[f] New Jersey." (66a)

On November 3, the court of appeals denied rehearing and rehearing in banc. Judge Becker would have granted rehearing in banc. (257a-258a) On November 18, the court of appeals granted CCC's motion to stay issuance of the mandate until December 12 to permit the filing of the instant petition for writ of certiorari. *See* Appendix G (267a). Because the Petition has been filed by that date, the stay will automatically continue pending disposition of the case in this Court. Fed. R. Civ. P. 41(b). Accordingly, pending such disposition, no proceedings in the district court will take place.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS WARRANTED BECAUSE THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S COMMERCE CLAUSE DECISIONS FORBIDDING EXTRATERRITORIAL STATE REGULATION AND WOULD PERMIT INDIVIDUAL STATES TO RESTRICT THE DISTRIBUTION OF GOODS INTO SISTER STATES AND TO USURP CONGRESS' EXCLUSIVE POWER TO REGULATE THE NATIONAL ECONOMY

The New Jersey Supreme Court authoritatively determined that the NJFPA has "extraterritorial reach to the franchise activities in states other than New Jersey." (128a) (heading) This Court should grant the petition for a writ of *certiorari* because the Third Circuit decision, permitting such an extraterritorial reach of a state statute, directly conflicts with this Court's decisions interpreting the Commerce Clause as imposing a *per se* ban on extraterritorial state regulation in the absence of congressional authorization. Review is especially warranted because the extraterritorial application of the NJFPA and other state franchise termination laws would have enormous practical consequences for the interstate distribution of goods and would violate fundamental policies of economic federalism embodied in the Commerce Clause.

1. It is settled that the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy* v. *Beer Institute*, 491 U.S. 324, 336 (1989) (citation and internal quotation marks omitted). Indeed, such application of a state statute "exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id.* "The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* Further, "no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." *Id.* at 337; *accord*, *Brown-Forman Distillers Corp.* v.

New York State Liquor Auth., 476 U.S. 573, 582-83 (1986); *Edgar* v. *MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion).[8]

It is also clear that extraterritorial application cannot be justified by the bare fact that a State has legal jurisdiction, as a matter of due process, to regulate a transaction. Thus, the statutes in *Healy* and *Brown-Forman* purported to apply only to transactions occurring within the State and involving state residents. Nonetheless, this Court invalidated the statutes because their practical impact was to regulate out-of-state commerce. "That the [law in question] is addressed only to sales of liquor in New York is irrelevant if the 'practical effect' of the law is to control liquor prices in other States." *Brown-Forman*, 476 U.S. at 583 (citation omitted); *see also Healy*, 491 U.S. at 333-34 n.9; *Edgar* v. *MITE*, 457 U.S. at 642-43 (Commerce Clause forbids extraterritorial effects of Illinois antitakeover statute even though statute applied only if target company had a substantial nexus to Illinois).[9]

Extraterritorial application of the NJFPA violates these principles. By compelling renewal of the CCC-ISI 1984 Agreement in the eight States, the NJFPA would force CCC to distribute its products in States outside New Jersey exclusively, and potentially in perpetuity, through ISI. Hence, the statute's practical effect—

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[8] *See also C&A Carbone, Inc.* v. *Town of Clarkstown*, 114 S. Ct. 1677, 1683 (1994) (municipality may not "steer solid waste away from out-of-town disposal sites that it might deem harmful to the environment" because States and localities may not "control commerce in other states") (citation omitted); *Southern Pac. Co.* v. *Arizona*, 325 U.S. 761, 775 (1945) (striking down an Arizona law limiting the length of railroad trains because the "practical effect of such regulation is to control train operations beyond the boundaries" of Arizona); *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) (a State "has no power to project its legislation into [another State] by regulating the price to be paid in that state for milk acquired there"); *New Hampshire Auto. Dealers Assn., Inc.* v. *General Motors Corp.*, 801 F.2d 528, 531-32 (1st Cir. 1986) (Breyer, J.).

[9] *Cf. Quill Corp.* v. *North Dakota*, 112 S. Ct. 1904, 1913 (1992) (holding that state tax on goods purchased in-state from out-of-state mail order house imposes an unconstitutional burden on interstate commerce and indicating that a state tax could have the minimum contacts necessary for jurisdiction under the Due Process Clause and yet fail Commerce Clause scrutiny).

indeed, its direct and immediate effect—is to determine how CCC, a California company, may distribute its products in States outside New Jersey after the parties' agreement has expired. The NJFPA would prevent CCC from selling its products directly to consumers in these States even though CCC would be dealing with *non-residents* of New Jersey, the goods would originate *outside* New Jersey, and the goods would move in interstate commerce *without ever passing through New Jersey*. In addition, the NJFPA requires CCC to seek regulatory approval in New Jersey—to establish to the satisfaction of a New Jersey judge and jury that it is in compliance with New Jersey's regulatory requirements—before it engages in transactions in other States. The very object of ISI's lawsuit is to enjoin CCC from engaging in such transactions unless CCC can meet the NJFPA's "good cause" standard.

The Third Circuit's decision thus plainly conflicts with the Commerce Clause's ban on extraterritorial regulation in the absence of congressional consent.

2. The particular extraterritorial regulation permitted by the Third Circuit is one that is especially repugnant to the principles of economic federalism underlying the dormant Commerce Clause and that has enormous practical implications for interstate commerce.

Franchise termination laws have generated "intense debate and considerable controversy" across the country.[7] Advocates of such statutes argue that they protect franchisees from unfair treatment by franchisors. Opponents argue that they interfere with freedom of contract and are anticompetitive, because they prevent manufacturers from selecting the most efficient means to distribute their products and thereby injure consumers.[8] Notably, the

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[7] American Bar Ass'n, Section on Antitrust Law, *Franchise Protection: Laws Against Termination and the Establishment of Additional Franchises* 2, 19-70 (1990) (analyzing both sides of the public policy debate).

[8] *See, e.g.*, Brickley, Dark & Weisbach, *The Economic Effects of Franchise Termination Laws*, 34 J.L. & Econ. 101, 126 (1991) ("termination laws increase (continued...)

Consumers League of New Jersey opposed the NJFPA when it was adopted in 1971. *Hearing on Assembly Bill No. 2063 Before the New Jersey Assembly Judiciary Comm.*, 194th Leg., 2d Sess. 15-20 (1971) (statement of Paul Krebs).

Congress has refused to enact a federal franchise termination statute. The Antitrust Division of the Department of Justice plainly has an institutional interest to bring to bear on this matter, for during both Democratic and Republican administrations it has opposed such bills as introducing inefficiencies into the distribution process and harming consumers.[2/] It has long been a tenet of federal antitrust policy that: "Competition is promoted when manufacturers are given wide latitude in establishing their method of distribution and in choosing particular distributors. . . . A contrary rule would foster rigidity in distribution arrangements, a result antithetical to a market dependent on vigorous competitive forces." *A.H. Cox & Co.* v. *Star Machinery Co.*, 653 F.2d 1302, 1306 (9th Cir. 1981) (Kennedy, J.).

[1/](...continued)
the costs of franchising and promote economic inefficiency"); Smith, *Franchise Regulation: An Economic Analysis of State Restrictions on Automobile Distribution*, 25 J.L. & Econ. 125, 154 (1982) (concluding that state regulation of automobile franchising has resulted in "a significant increase in vehicle prices—resulting in a large wealth transfer from consumers to dealers and a reduction in the volume of new-vehicle sales").

[2/] *See Hearings on H.R. 5016 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 50 (1977) (proposed Franchising Termination Practices Reform Act, "particularly its failure to renew provisions, could unnecessarily burden the development of the competitive systems of distribution") (testimony of Joe Sims, Deputy Assistant Attorney General, Antitrust Division); *Hearing on S. 1256 Before the Senate Judiciary Comm.*, 97th Cong., 2d Sess. 19-21 (1982) (proposed legislation to require good cause for terminating or failing to renew a dealership to distribute computers or other office products would have "significant anticompetitive effects," forcing consumers to pay for "inefficiencies in the distribution process that might result from the restrictions on suppliers' abilities to appoint and terminate dealers") (statement of William F. Baxter, Assistant Attorney General, Antitrust Division).

The great majority of States also have refused to adopt franchise termination legislation. New Jersey is one of only 18 States that have adopted any form of a franchise termination statute and one of only nine States that compel the renewal of a franchise after its stated expiration date.[10/] Seven of the ten States (other than New Jersey) covered by the CCC-ISI 1984 Agreement do not have such a statute, but instead adhere to the common law rule enforcing the terms of the parties' contract.[11/] In the past year alone, the legislatures of two of these States, Maryland and Maine, have considered and rejected a general franchise termination statute along the lines of New Jersey's.[12/] Yet the Third Circuit's decision means that New Jersey can now impose on those States the very types of restrictions on the right to change distribution methods that they, together with Congress, have rejected. The impact of the NJFPA on other States is magnified because many distributors choose to locate in the central "hub" location of

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[10/] The district court listed 17 States (62a-63a), and Iowa adopted a franchise termination statute during 1993. 2 W.M. Garner, *Franchise and Distribution Law and Practice* § 10.01 (1990 & Supp. 1994). The Mississippi and Missouri statutes only require notice of termination and impose no substantive limit on the franchisor's right to terminate. The statutes in seven other States distinguish between termination and nonrenewal, either permitting the franchisor to provide that the franchise is not renewable or requiring only that the franchisor give sufficient notice of nonrenewal or that the franchisor repurchase the franchisee's inventory and equipment. (62a-63a)

[11/] Of the ten States, only Connecticut, Delaware, and the District of Columbia have adopted franchise termination laws. Unlike the NJFPA, however, the Delaware and D.C. statutes apply only to the prototypical franchise situation where a "franchise fee" is paid. Thus, they would not compel renewal of the kind of distribution agreement involved here, in which no franchise fee was paid. J.A. 217. Notably, the Connecticut statute has been construed as not having extraterritorial effect. *Carlos* v. *Phillips Business Systems, Inc.*, 556 F. Supp. 769, 777 (E.D.N.Y.), *aff'd*, 742 F.2d 1432 (2d Cir. 1983).

[12/] A committee of the Maryland House voted 19-2 against the bill; a Senate committee voted 11-0 against. The Maine legislature elected to limit franchise legislation to the fast-food industry, and even that narrow bill was vetoed by the Governor as harmful to consumers. *See* [Current] Bus. Fran. Guide (CCH) ¶ 2002, at 1609 (Oct. 1994); Int'l Franchise Ass'n, *Franchise Legal Digest* 1 (Summer 1994).

northern New Jersey to market products throughout the entire Northeast. J.A. 1021, 1405.

Extraterritorial application of the NJFPA thus implicates "the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy*, 491 U.S. at 335-36. It represents the kind of regional, and even national, regulation of a vital aspect of a competitive economy that "is reserved by the Commerce Clause to the Federal Government and [that] may not be accomplished piecemeal through the extraterritorial reach of individual state statutes." *Id.* at 340.

3. When applied extraterritorially, the NJFPA interferes with commerce in a fundamentally protectionist manner: it burdens out-of-state transactions by requiring manufacturers to continue distributing their products in other States through New Jersey-based companies regardless of whether more efficient methods of distribution are available that would benefit consumers in other States. The New Jersey Supreme Court noted that the purpose of the NJFPA is to protect in-state commercial interests (101a-107a), and the district court correctly found that the NJFPA was a form of "local protectionism." (71a; *see also* 68a) Here, the statute has been invoked to force a California supplier in the rapidly changing and highly competitive computer industry to do business through a New Jersey company, potentially in perpetuity, rather than distribute its products directly or hire an out-of-state distributor that it believes can do a better job in States that want CCC products to help educate their citizens. "[T]he Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 145.[12]

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[12] *See also C&A Carbone, Inc.* v. *Town of Clarkstown*, 114 S. Ct. at 1684 ("State and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors"); *Toomer* v. (continued...)

4. Extraterritorial application of state franchise termination statutes also raises especially important Commerce Clause issues because such laws regulate the *methods* by which goods may be distributed in commerce. In this respect, they are akin to state regulations burdening transportation and other instrumentalities of commerce, which, as this Court has long recognized, raise heightened Commerce Clause concerns.[14] Like those regulations, franchise termination statutes such as the NJFPA cut across industry lines. The decision below thus threatens every manufacturer, in every sector of the economy, that relies on multistate distributors to deliver its goods to consumers. In practical terms, therefore, the instant case is as important as, if not more important than, many of the leading Commerce Clause cases.[15] Moreover, the extraterritorial regulations at issue in *Healy* and *Brown-Forman* affected only the prices at which goods in one particular industry were sold. At stake here is an extraterritorial law that, as applied in cases like this one, has a far more dramatic effect: it prevents out-of-state suppliers from selling directly to

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[13](...continued)
Wiseell, 334 U.S. 385, 403-04 (1948) (requirement that work be done in-state "divert[s] to [one State] employment and business which might otherwise go to [another]; the necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry").

[14] *See, e.g.*, *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pac. Co.* v. *Arizona*, 325 U.S. 761 (1945). As Professor Regan has explained, regulation of the instrumentalities of commerce merits special judicial scrutiny because "[t]he interest in question is the national interest in an efficient transportation and communications network . . . [which] is important not just to the economy, but also, and more significantly from a constitutional perspective, to the whole project of a political union." Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865, 1883 (1987).

[15] *Compare, e.g.*, *Healy*, 491 U.S. at 335-40 (price of beer); *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 349-352 (1977) (North Carolina law that restricted grade identifications on closed apple containers); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 275-76 (1977) (application of Mississippi business tax to shipment of cars by motor carrier into State); *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 139-42 (packaging of cantaloupes).

consumers at any price.[16]

Because of the Commerce Clause's central role in "creat[ing] an area of trade free from interference by the States," *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 328 (1977), this Court has frequently granted *certiorari* in Commerce Clause cases in the absence of conflicts among the lower courts.[17] But the need for *certiorari* in this case is even plainer, for there is deepening division among the lower courts regarding the constitutionally acceptable scope of state franchise laws under the Commerce Clause. Until now, some lower courts that have considered franchise or dealership termination laws have construed such statutes as not having extraterritorial application, in part to avoid Commerce Clause concerns.[18] But other courts have

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[16] While the impact is especially dramatic in cases such as this one where the distributor has exclusive rights, extraterritorial application of the NJFPA to compel renewal of a non-exclusive distribution arrangement would equally offend the Commerce Clause. It would force a supplier to engage in dual distribution in other States and prevent it from hiring a different distributor on an exclusive basis (or vertically integrating and handling the distribution itself), solely in order to assure that New Jersey's citizens receive perpetual benefits from commerce flowing entirely outside New Jersey's borders.

[17] *E.g.*, *West Lynn Creamery, Inc.* v. *Healy*, 114 S. Ct. 2205 (1994); *Associated Industries of Missouri* v. *Lohman*, 114 S. Ct. 1815 (1994). Indeed, in *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2023 (1992), this Court explained that it granted *certiorari* not because of any conflict among the lower courts but "because of concern that the decision below was inconsistent with *Philadelphia* v. *New Jersey*, [437 U.S. 617 (1978)]." *See also Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009, 2012 (1992) (granting *certiorari* "[b]ecause of the importance of the federal question and the likelihood that it had been decided in a way conflicting with applicable decisions of this Court, Supreme Court Rule 10.1(c)").

[18] *Kansas City Trailer Sales* v. *Holiday Rambler Corp.*, 1994 WL 57400 (W.D. Mo. 1994); *Wright-Moore Corp.* v. *Ricoh Corp.*, 794 F. Supp. 844, 860-61 (N.D. Ind. 1991), *aff'd on other grounds*, 980 F.2d 432 (7th Cir. 1992); *Carlos* v. *Philips Business Systems, Inc.*, 556 F. Supp. 769, 777 (E.D.N.Y.), *aff'd*, 742 F.2d 1432 (2d Cir. 1983); *see also Central GMC, Inc.* v. *General Motors Corp.*, 946 F.2d 327, 334-35 (4th Cir. 1991) (rejecting construction of (continued...)

disagreed,[12] and the Third Circuit has now provided important support to those who would allow States to restrict interstate commerce beyond their borders. And if one State can give its corporations passports to do business in perpetuity in other States, then competition to enact extraterritorial legislation promoting one State's economic interests at the expense of other States cannot be far behind. The need for this Court's guidance is plain.

II. REVIEW IS INDEPENDENTLY WARRANTED BECAUSE THE LEGAL FICTIONS EMPLOYED BY THE THIRD CIRCUIT WOULD SERIOUSLY ERODE THE PROTECTIONS OF THE COMMERCE CLAUSE

The Third Circuit believed that it could avoid the restrictions of the Commerce Clause by recasting the issue as involving the choice of the appropriate state-law "contract rule" to interpret the parties' multistate agreement and by treating the extraterritorial application of the NJFPA merely as the consequence of CCC's agreement with a New Jersey-based distributor. But this Court, in applying the dormant Commerce Clause, has always focused on the "practical operation" of state statutes, *Lewis* v. *B.T. Inv. Mgrs., Inc.*, 447 U.S. 27, 37 (1980), and on their "practical effects." *Healy*, 491 U.S. at 336. Review by this Court is needed to make

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[12](...continued)
Maryland motor vehicle franchise statute that would have raised Commerce Clause concerns by penalizing out-of-state motor vehicle manufacturer for discontinuing operations in Maryland, since "'[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State'") (quoting *Healy*, 491 U.S. at 336).

[12] *CSS-Wisconsin Office* v. *Houston Satellite Sys., Inc.*, 779 F. Supp. 979, 986 (E.D. Wis. 1991) ("because the distributor relationship between Consumer Satellite and Houston Satellite involves commerce that actually takes place in Wisconsin, the court is not persuaded that applying the Wisconsin Fair Dealership Law to the distributor relationship would offend the commerce clause"); *Diesel Service Co.* v. *Ambac Int'l Corp.*, 961 F.2d 635, 642 (7th Cir. 1992) (application of Wisconsin franchise law does not offend Commerce Clause when "at least one-third of the commerce took place within Wisconsin's borders").

clear that extraterritorial application of state law cannot be justified by the legal fiction that the court is enforcing the parties' own agreement—a theory that could just as easily be used to uphold other regulations forbidden by the Commerce Clause absent the consent of Congress.

1. The court of appeals sought to distinguish *Healy* on the basis that "it was the parties' own agreement," rather than the New Jersey legislature, "which operated to project the New Jersey law outside of New Jersey's borders." (26a) But this assertion is simply untrue. The agreement expressly provides that it will terminate after five years and that it is to be governed by California law. In dismissing ISI's common-law breach of contract claim, the district court held that the CCC-ISI 1984 Agreement is "clear and unambiguous" and that it expired on July 31, 1989. (230a)[20] The court of appeals affirmed this decision. Thus, any obligation on the part of CCC to continue distributing its products through ISI in the eight States after this date is solely the result of the NJFPA and the New Jersey Supreme Court's construction of the statute as having extraterritorial effect.

The state court applied the NJFPA to override the parties' agreement, and to force upon CCC the very kind of perpetual relationship that the parties in fact rejected, because of the "public policy" of the NJFPA and the intent of "the New Jersey Legislature." (107a, 129a) The New Jersey Supreme Court recognized that the extraterritorial application of the NJFPA was the product of "State power" (129a), not private contract: "[s]urely nothing indicates that CCC intended or agreed that the New Jersey law would cover its activities in the sister states of New Jersey." (128a-129a) The Third Circuit erred by ignoring the New Jersey

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[20] As the district court explained in granting summary judgment to CCC on the Commerce Clause issue, the "contract provided for application of California law and by its terms expired almost four years ago. . . . [W]hat [CCC] seeks to prevent is not the operation of its contract with ISI, but rather the State of New Jersey from superseding the contract to give ISI what may amount to a perpetual and exclusive right to distribute CCC's products in [the eight States]." (80a; internal quotation marks omitted).

Supreme Court's "authoritative" determination, *England*, 375 U.S. at 417, that the NJFPA applies extraterritorially and that the New Jersey legislature specifically intended such extraterritorial application.

2. The Third Circuit's conclusion that it was "the parties' own agreement" that produced extraterritorial regulation was therefore indefensible. So was the analysis that led the court to this untenable conclusion. The court of appeals reasoned that, since there is "nothing untoward" about applying one State's law to interpret a multistate contract, extraterritorial application of the NJFPA similarly presented no Commerce Clause issue. (25a) But it is fanciful to justify extraterritorial application of a regulatory statute like the NJFPA—one that mandates commercial behavior by government fiat—by analogy to rules of contract interpretation that honor the parties' agreement.

There is a fundamental difference between state laws that interpret a contract in order to enforce its terms, and statutes like the NJFPA that are exercises of state power imposing restrictions on out-of-state distribution contrary to the terms of the contract. Ordinarily, the former raise no Commerce Clause question because, by enforcing private agreements, they facilitate and indeed are vital to interstate commerce itself. But it does not follow that a state law overriding the parties' contract likewise raises no Commerce Clause concerns. On the contrary, state regulation that supersedes consensual agreements is precisely the kind of exercise of state power that is most likely to raise serious constitutional questions under the dormant Commerce Clause.

3. The Third Circuit also reasoned that CCC, not New Jersey, was responsible for the extraterritorial effects of the statute because it was CCC that chose to enter into a multistate distribution agreement with a New Jersey-based distributor. (*See* 26a). In substance, the Third Circuit said that extraterritorial regulation by New Jersey was inconsequential because it could have been avoided if CCC had simply forgone doing business on a multistate basis with ISI. But this reasoning begs the question of whether New Jersey had the power to put CCC to such a choice. It has long been

established, under the doctrine of unconstitutional conditions, that States do not have that power. Just as New Jersey could not forbid out-of-state suppliers from doing business with New Jersey-based distributors outright, so it cannot force out-of-state companies to choose between forgoing *interstate* business with New Jersey distributors and giving up their right, under the Commerce Clause, to be free from extraterritorial regulation. "[T]he power of the state [to place conditions on foreign corporations doing business in the State] is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights." *Western & Southern L.I. Co.* v. *Board of Equalization*, 451 U.S. 648, 664 (1981) (citation omitted); *see Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967) ("There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one.").[21/]

The Third Circuit's reasoning is a blueprint for eviscerating the Commerce Clause. For example, under the Third Circuit's analysis, the brewers in *Healy* and the distillers in *Brown-Forman* could have avoided the out-of-state effects of the statute by "choosing" not to do business with Connecticut or New York wholesalers. The doctrine of unconstitutional conditions precludes the use of such fictions to destroy the protections of the Commerce Clause. It bears emphasis that these protections not only confer rights on CCC, *see Dennis* v. *Higgins*, 498 U.S. 439 (1991), but also are an essential structural safeguard preserving a federal economic union. It is therefore all the more important that the

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[21/] *See also Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.*, 486 U.S. 888, 893 (1988) ("The Ohio statutory scheme thus forces a foreign corporation to choose between exposure to the general jurisdiction of Ohio courts or forfeiture of the limitations defense, remaining subject to suit in Ohio in perpetuity.. . . The State may not withdraw [statute of limitations] defenses on conditions repugnant to the Commerce Clause. . . . The State may not condition the exercise of the defense on the waiver or relinquishment of rights that the foreign corporation would otherwise retain."); *Western Union Tel. Co.* v. *Kansas*, 216 U.S. 1, 47-48 (1910) (State may not condition right of out-of-state company to do business in the State upon company's submission to extraterritorial tax that violated Commerce Clause).

Commerce Clause not "be relegated to the status of a poor relation" in constitutional analysis. *Dolan* v. *City of Tigard*, 114 S. Ct. 2309, 2320 (1994).[22]

4. The Third Circuit's opinion may also be read as embracing the equally fallacious and dangerous fiction that CCC "agreed" to the extraterritorial application of the NJFPA because the prevailing law of New Jersey (including the NJFPA) can be presumed to be a part of any contract with a New Jersey-based distributor. This reasoning also begs the question, because the prevailing background law also includes the U.S. Constitution and any limitations it imposes on the extraterritorial application of the NJFPA. If the parties' contract is to be construed as having been executed against a legal background that included the NJFPA, it must be construed as having been formed against a background that included the Commerce Clause as well. This fiction also would nullify the Commerce Clause inasmuch as any commercial transaction could be said to take place against the background of existing state law.

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[22] To appreciate the radical nature of the Third Circuit's holding, it is useful to note that even in the context of the market-participant exception, where the Commerce Clause restriction on state activity is relaxed, this Court has never held that contractual conditions voluntarily agreed to by states and those with whom they do business are exempt from Commerce Clause scrutiny. In *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82 (1984), for example, this Court struck down Alaska's attempt to require contractually that timber felled on state lands be processed within Alaska prior to export. Similarly, in *Wisconsin Dep't of Industry, Labor and Human Relations* v. *Gould, Inc.*, 475 U.S. 282 (1986), this Court held that a state could not use the market participant exception to refuse to enter into contracts with three-time violators of the National Labor Relations Act. The Court concluded that, "for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation." *Id.* at 289. And in *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978), this Court invalidated under the Privilege and Immunities Clause of Article IV a state law requiring companies engaged in the oil and gas business in Alaska to give preferences to state residents.

If the Constitution imposes such limits where the state is acting at the zenith of its powers—as a market participant or in regulating the use of its natural resources—*a fortiori* a state does not have the authority to require an out-of-state company, as a condition of its doing business within the state with a *private* entity, to accept whatever contractual terms the state imposes in the guise of "interpreting" the contract between the out-of-state company and the in-state entity.

Any burden on commerce could thus be dismissed as traceable to the parties' agreement rather than to action by the State.

For example, suppose the manufacturers and distributors in *Healy* or *Brown-Forman* had entered into a contract that was completely silent as to the relative position of in-state and out-of-state prices, but the State had a rule (labelled a rule of "contract interpretation" rather than a price-affirmation statute) specifying that whenever brewers or distillers enter into contracts with in-state distributors, an implied term of the contract is that the distributor will be charged prices no less favorable than those charged to distributors in neighboring States. Surely such a law would be invalid under the Commerce Clause for the same reasons as the laws struck down in *Healy* and *Brown-Forman*. But under the Third Circuit's approach, such a law would have to be upheld on the ground that, by entering into the agreement with the in-state distributors, the manufacturers "agreed" to the State's rule of contract law.

5. Equally dangerous in creating a blueprint for evasion was the Third Circuit's decision that the limitations of the Commerce Clause could be ignored here on the ground that only a "choice of law" question was involved. The New Jersey Supreme Court's "choice of law" ruling was based entirely on New Jersey's "strong policy in favor of protecting its franchisees," as reflected in the NJFPA, and more specifically on the court's reading of the New Jersey legislature's intention to protect New Jersey franchisees even when they operate outside the State. (106a-107a) Under the dormant Commerce Clause, the New Jersey legislature simply does not have the power to confer such extraterritorial protection, however styled or packaged. Putting a "choice of law" label on the State's exercise of power plainly cannot cure this defect. Indeed, the Third Circuit's reasoning is flatly inconsistent with a decision of the Seventh Circuit recognizing the distinction between the choice-of-law and Commerce Clause issues.[22] Review by this

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[22] In *Wright-Moore Corp.* v. *Ricoh Corp.*, 908 F.2d 128, 132-34 (7th Cir. 1990), the Seventh Circuit held that, under Indiana choice-of-law principles, the (continued...)

Court is urgently needed to make clear that the protections of the Commerce Clause may not be circumvented through such an artifice.

6. There is yet another reason that the court of appeals' decision warrants review: It runs afoul of the seminal principle of *Shelley* v. *Kraemer*, 334 U.S. 1, 19-20 (1948), that enforcement of state contract rules cannot be immunized from judicial scrutiny by treating the results of such enforcement as the product of the contracting parties' own agreement rather than of how the State's laws treat that agreement. In *Shelley* and subsequent cases, the Court has made clear that, even when courts are merely enforcing a private agreement, the effects of such state action must be tested for conformity with the Constitution. *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 668 (1991).[24] Yet the Third Circuit failed to perceive any state action implicating the Commerce Clause here even though New Jersey, far from enforcing the parties' own agreement, is creating a new agreement for them with enormous implications for the effective distribution of CCC's products in the entire Northeast region of the country.[25] The Third Circuit's

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[23](...continued)
Indiana franchise statute would apply to a multistate distribution agreement notwithstanding a New York choice-of-law clause. But the court of appeals observed that "[a]pplication of Indiana franchise law to control who sells [the supplier's products] in other states may present difficulties under the commerce clause" and that "[t]he import of the commerce clause on the application of Indiana law" required separate analysis. *Id.* at 134 n.2. On remand, the district court construed the statute as applying only within Indiana, in part because extraterritorial application would raise Commerce Clause difficulties. *Wright-Moore Corp.* v. *Ricoh Corp.*, 794 F. Supp. 844, 860-61 (N.D. Ind. 1991), *aff'd on other grounds*, 980 F.2d 432 (7th Cir. 1992).

[24] *See also Barrows* v. *Jackson*, 346 U.S. 249, 254 (1953); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 172 (1972) ("the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination").

[25] To say that judicial enforcement of contractual terms is state action *subject* to the Commerce Clause (contrast the Impairment of Contracts Clause, Art. I, (continued...)

holding that rewriting the parties' private agreement does not represent action by the State independently warrants review by this Court.

III. REVIEW IS INDEPENDENTLY WARRANTED BECAUSE THE THIRD CIRCUIT'S INSERTION OF A DISCRIMINATION REQUIREMENT INTO THIS COURT'S "*PIKE*" TEST CONFLICTS WITH *PIKE* ITSELF AND WITH THE LAW OF SEVERAL OTHER CIRCUITS

The court of appeals also upheld the extraterritorial application of the NJFPA under the *Pike* balancing test, but only by following a line of Third Circuit cases that have radically altered the *Pike* test and set a dangerous precedent that separately warrants review by this Court.

In keeping with the now-settled rule in the Third Circuit,[25] the court of appeals flatly refused even to *consider* as part of the burden on interstate commerce "the effect of the state regulation on the commerce of other states." (28a) The court held that "the *only* incidental burdens on interstate commerce that implicate the commerce clause . . . are those that discriminate against interstate

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[24](...continued)
§ 10, *see Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924)), does not of course imply that such action is *unconstitutional*. In fact, state laws that construe or enforce contracts according to their terms—as distinct from laws that supersede those terms—would ordinarily pass muster quite easily under the Commerce Clause, for reasons that have already been explained. *See* p. 19, *supra*.

[25] *See, e.g.*, *Old Bridge Chemicals, Inc.* v. *New Jersey Dept. of Envtl. Protection*, 965 F.2d 1287, 1295 (3d Cir.) ("legislation will not be invalidated under the *Pike* test unless it imposes *discriminatory* burdens on interstate commerce") (emphasis in original), *cert. denied*, 113 S. Ct. 602 (1992); *J. Filiberto Sanitation, Inc.* v. *New Jersey Dept. of Envtl. Protection*, 857 F.2d 913, 922 (3d Cir. 1988) ("Once it is clear no such discrimination has been alleged, 'the inquiry as to the burden on interstate commerce should end'") (citation omitted); *Norfolk Southern Corp.* v. *Oberly*, 822 F.2d 388, 406 (3d Cir. 1987).

commerce." (28a; emphasis in original; citation omitted). And the court found that "there is no burden on interstate commerce inasmuch as the NJFPA is facially neutral as to the interstate nature of the parties' agreement." (29a) Under the court of appeals' analysis, it was therefore wholly irrelevant that application of the NJFPA out-of-state would "impose[] a straitjacket on [CCC's] operations and ultimately harm[] consumers by prohibiting the creation of an efficient distribution system" for delivery of goods in other States. (29a)

The Third Circuit rule and its application to this case are in direct conflict with *Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982).In *MITE*, this Court invalidated an Illinois anti-takeover statute under the *Pike* test, even though it applied evenly to in-state and out-of-state transactions, and even though there was no allegation that the Illinois statute discriminated against interstate commerce. The Court struck down the statute entirely on the basis of the burdens it imposed on "out-of-state transactions." *Id.* at 644. The Third Circuit rule also conflicts with the decisions of many other Circuits.[21]

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[21] *First Circuit: Hyde Park Partners, L.P.* v. *Connolly*, 839 F.2d 837, 847-48 (1st Cir. 1988) (applying *Pike* test to affirm preliminary injunction against non-discriminatory state takeover statute, concluding that it unduly burdened commerce by reducing takeover bids and harming investors); *see also New Hampshire Auto. Dealers Ass'n, Inc.* v. *General Motors Corp.*, 801 F.2d 528, 532 (1st Cir. 1986) (Breyer, J.) (citing *Pike* and explaining that "these four factors—influencing the price of fleet sales transactions outside New Hampshire, limiting access by out-of-state manufacturers to New Hampshire consumers, limiting access by New Hampshire consumers to out-of-state sources of supply, and protecting New Hampshire retailers from outside competition—taken together suggest the possibility of a burden on commerce disproportionate to the interest the statute serves") (emphasis omitted).

Fourth Circuit: Medigen of Kentucky, Inc. v. *Public Service Comm'n*, 985 F.2d 164, 166-67 (4th Cir. 1993) (applying *Pike* to invalidate nondiscriminatory law requiring collectors, haulers, and transporters of infectious medical waste to obtain a certificate of convenience and necessity, and finding that "the burden that the certification requirement imposes on interstate commerce outweighs its local benefits").

Sixth Circuit: ANR Pipeline CO. v. *Schneidewind*, 801 F.2d 228, 237-

(continued...)

Regardless of whether individual Justices of this Court might, in a proper case, vote to alter or even abolish the *Pike* test, *see Bendix Autolite Corp.*, v. *Midwesco Enterprises, Inc.*, 486 U.S. 888, 897-98 (1988) (Scalia, J., concurring in judgment), the Third

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[11](...continued)

38 (6th Cir. 1986) (holding that nondiscriminatory state law requiring any natural gas utility to obtain advance approval from state public service commission before issuing securities, even if the proceeds would be used to finance a project in another State, violates *Pike* because "the burdens of expense, delay, and administrative hassle of 'advance approval' securities regulation far outweigh the benefits, if any," to the State), *aff'd on other grounds*, 485 U.S. 293 (1988).

Eighth Circuit: Pioneer Military Lending, Inc. v. *Manning*, 2 F.3d 280, 283 (8th Cir. 1993) (invalidating loan rules under *Pike*, because company "does business throughout the country . . . .[I]ts business would be adversely affected if it had to comply with differing state laws"; the burden that state "small loan laws would place on interstate commerce . . . is great compared to the relatively slight local interest served").

Ninth Circuit: NCAA v. *Miller*, 795 F. Supp. 1476, 1484 (D. Nev. 1992) ("A statute's effect beyond the enacting state's borders is also relevant in balancing the affected interests"), *aff'd*, 10 F.3d 633 (9th Cir. 1993); *BFI Medical Waste Sys., Inc.* v. *Whatcom County*, 756 F. Supp. 480, 486 (W.D. Wash. 1991) (holding that county's ban on importation of medical wastes would fail *Pike* test), *aff'd in relevant part, remanded in part*, 977 F.2d 587 (9th Cir. 1992).

Tenth Circuit: Dorrance v. *McCarthy*, 957 F.2d 761, 764 (10th Cir. 1992) (applying *Pike* test to assess the constitutionality of Wyoming's ban on the private ownership of big game animals, which applied equally to in-state and out-of-state residents, and specifically rejecting the Third Circuit's analysis: "Defendants contend that when a statute regulates evenhandedly, the extent of the burden the statute imposes on interstate commerce is irrelevant; the only inquiry is whether the statute imposes a different burden on interstate commerce than it does on intrastate commerce. Defendants' argument is not only circular, but it completely misstates the *Pike* analysis. By definition, a statute that regulates evenhandedly does not impose a different burden on interstate commerce than it does on intrastate commerce.").

Eleventh Circuit: Diamond Waste, Inc. v. *Monroe County*, 939 F.2d 941, 944-45 (11th Cir. 1991) (invalidating county ban on importation of out-of-county waste under *Pike*, even though "the resolution is applied relatively 'even-handedly' and accomplishes a 'legitimate local purpose,'" because "were other counties to adopt the same regulation in response, the impact on interstate commerce could be substantial").

See also Pacific Northwest Venison Producers v. *Baker*, 20 F.3d 1008, 1015 (9th Cir. 1994) (noting a conflict and indicating that decisions in the Second and Seventh Circuits follow the Third Circuit rule).

Circuit has no power to engage in any sort of pre-emptive overruling or modification of *Pike*. *See Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

Moreover, the Third Circuit's imposition of a "discrimination" requirement in the *Pike* context is analytically insupportable and doctrinally unjustified. Discriminatory legislation is *per se* unconstitutional under the Commerce Clause without regard to *Pike*, which is designed for review of facially *neutral* legislation. By definition, the *Pike* test applies when "a statute has only indirect effects on interstate commerce and regulates *evenhandedly*." *Brown-Forman*, 476 U.S. at 579 (emphasis added). *See also C&A Carbone, Inc.* v. *Town of Clarkstown*, 114 S.Ct. 1677, 1689 (O'Connor, J., concurring) ("Even a nondiscriminatory regulation may nonetheless impose an excessive burden on interstate trade when considered in relation to the local benefits conferred") Indeed, this Court rejected the Third Circuit's approach over a century ago in *Brimmer* v. *Rebman*, 138 U.S. 78, 83 (1891) ("a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute") (citation omitted). That fundamental principle of Commerce Clause jurisprudence has been repeatedly reaffirmed.[22]

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[22] *See Dean Milk Co.* v. *Madison*, 340 U.S. 349, 354 n.4 (1951) (finding it "immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce"); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 112 S. Ct. at 2025 (burden on in-state waste does not justify burden on out-of-state waste); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 265, 271 (1984) (fact that some locally produced alcoholic beverages, together with out-of-state beverages, were denied special exemption from state liquor tax did not save it from being invalid).

CONCLUSION

This Court, and indeed the entire Federal Government, has a special role in preventing threats to the "Commerce Clause's central objective of securing a national 'area of free trade among the several States.'" *Associated Industries of Missouri* v. *Lohman*, 114 S. Ct. 1815, 1822 (1994) (citations omitted).[22] Review is urgently needed here to prevent the very real threat to the national economy posed both by the Third Circuit's decision and by the

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[22] "The United States has an interest in proper interpretation of the role of the Commerce Clause in our federal system . . . [and in] the free flow of commerce among the states and proper consideration of the prerogatives of the states." Brief for the Securities & Exchange Comm'n and the United States as *Amici Curiae*, *CTS Corp. v. Dynamics Corp. of Am.*, Nos. 86-71 & 86-97, Jan. 20, 1987, at 2. Accordingly, the United States has participated as an amicus at the merits stage in *CTS*, *MITE*, and several of the other recent Commerce Clause cases before the Supreme Court. *See, e.g.*, *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992).

blueprint it has provided for others to follow. The petition for writ of *certiorari* should be granted.

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